Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 78-595

* * *

LONE STAR GAS COMPANY,
A DIVISION OF ENSERCH CORPORATION,
Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, WARREN G. HARDING, STATE TREASURER, AND JOHN L. HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS,
Respondents

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

BRIEF FOR RESPONDENTS IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

MARTHA E. SMILEY
Assistant Attorney General
Chief, Taxation Division

MYRA A. MCDANIEL
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Counsel for Respondents

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BRIEF FOR RESPONDENTS IN OPPOSITION

* * *

Respondents, Bob Bullock, Comptroller of Public Accounts, Warren G. Harding, successor to Jesse James, State Treasurer and John L. Hill, Attorney General of the State of Texas, respectfully submit the following brief in opposition to the issuance of a writ of certiorari as prayed for by Petitioner.

QUESTIONS PRESENTED

Petitioner presents two questions:

1. Whether state taxing officials may, consistent with the Fourteenth Amendment:

a. promulgate, during the pendency of their suit for tax refund, a regulation legitimizing their position in the lawsuit (reversing earlier regulations favorable to Petitioner) and thus secure a judgment denying a refund based on the retroactive application of the new regulation; and

b. retroactively apply the new regulation only against the Petitioner while admittedly permitting the Petitioner's competitors to receive tax refunds on identical transactions during the same time period.

2. Whether the interpretation of Article 20.04(G)(3)(a) by the Supreme Court of Texas so that only taxpayers purchasing goods outside the State of Texas will be taxed unduly burdens interstate commerce?

Respondent will reply to both questions by showing that:

1. The decision of the Texas Supreme Court was based entirely on state grounds.

2. Petitioner's federal rights were not denied.

3. Petitioner did not adequately preserve its federal questions to invoke the jurisdiction of this Court.

ARGUMENT

1. The decision of the Texas Supreme Court was based entirely on interpretation of the Texas statute.

Article 20.03, Taxation-General, 20A V.T.C.S.,

imposes a Use Tax on the storage, use or consumption of taxable items in the State of Texas. Petitioner contended that the exemption found in Art. 20.04(G)(3)(a) for the "use in this State of tangible property which is acquired outside this State and which is moved into this State for use as a licensed and certificated carrier of persons or property" exempted all taxable events, i.e. storage, use and other consumption of property. The Texas Supreme Court determined that the "use" tax in Texas is imposed on (1) the use of property; (2) the storage of property; and (3) the other consumption of property. It then determined that the exemption in question applied only to "use" and did not include either "storage" or "other consumption" within the State of Texas. It held, therefore, that Lone Star was liable for tax on storage of the pipe within the State of Texas, "where the pipe in question had reached the end of its international transportation and had not begun to be consumed in an activity claimed to be exempt from the tax on use."

The Court did not reach the question of whether pipelines are or should be treated as licensed and certificated carriers. This is the only issue which had related federal questions. In both the Texas Court of Civil Appeals and the Texas Supreme Court, Petitioner claimed that failure to accept its permit as the equivalent of a license or certificate for purposes of the exemption would cause the exemption to operate in an unconstitutional manner. It was only in the context of similar treatment under the exemption for all carriers of persons and/or property that Petitioner claimed a change in administrative policy would operate unfairly. Since the Texas Supreme Court did not reach the issues raised by Petitioner's "licensed and certificated" argument, the Court was not required to and did not reach the question of unequal treatment.

The question of constitutional implications under the

Commerce Clause was not raised. As a result, the Court did not consider the possibility of an undue burden on interstate commerce caused by its decision.

This Court set out the rule for review of state statutes in taxing matters in *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975):

> "... a State's highest court is the federal arbiter of the meaning of state statutes . . ., and therefore our review of the holding of a state court respecting the legal incidence of a state excise tax is guided by the following: 'When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation, it will be deemed conclusive.' "

The construction placed on Article 20.04(G)(3)(a) by the Texas Supreme Court is wholly grounded in Texas law without reaching or deciding any federal questions. The construction is entirely consistent with the statutory language. Other sections of the exemption in question excluded from the Use Tax, "temporary storage" Art. 20.04(G)(3)(b), "storage, use or consumption" Art. 20.04(G)(3)(c), "storage and use" Art. 20.04(G)(3)(d). It is clear that the Legislature was aware of the different taxable events included in Use Tax and selectively exempted some of those events under certain circumstances, but did not provide a blanket exemption for all taxable events in section (a). In this instance, even if a federal question had been presented, since the decision of the state court rests solely on an independent and adequate nonfederal ground, this Court would lack jurisdiction to review that decision. *Viator v. Stone*, 336 U.S. 948 (1948). Only the State Supreme Court can

speak with final authority on who bears the tax burden under a state statute. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 194 (1910).

2. Petitioner's federal rights were not denied.

Petitioner claims it was denied due process and equal protection by actions of the State Comptroller. Since the taxability of the pipe is based on the non-exempt storage within the state and not whether the pipe is or is not the equivalent of a licensed and certificated carrier, the change in the Comptroller's position on carriers has not harmed Petitioner.

The Court may substitute its judgment for an administrative determination on questions of law. *People v. West Publishing Co.*, 216 P.2d 441, 446 (Cal. 1950); 68 Am. Jur. 2d, Sales and Use Taxes §240 (1973). A regulation which is in conflict with the meaning of a statute as determined by a court must fall. *United States Gypsum Co. v. Green*, 110 So.2d 409, 416 (Fla. 1959); 68 Am. Jur. 2d, Sales and Use Taxes §233. "Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state or relief from the consequences of a misinterpretation by either." *Thompson v. Kentucky*, 209 U.S. 340, 346 (1908); *Watson v. Kenlick Coal*, 365 F. Supp. 456, 458 (E.D. Ky. 1973; aff'd 498 F.2d 1183, cert. den. 422 U.S. 1012).

There is no evidence that Petitioner was treated differently from other purchasers of pipe in 1975. Petitioner alleges it was treated differently based on Respondents' admission that on other occasions taxpayers were given refunds on use tax previously collected or paid on pipe purchased outside of the State of Texas and moved into the State of Texas for assembly into a licensed and certificated carrier of property. (Tr. 69). There is no evidence that such refunds were made

during the same period of time that Petitioner's request for refund was denied; and there is no evidence that Petitioner was similarly situated with those to whom refunds were granted.

Unless the power of an agency to fashion remedies has been removed, it cannot be concluded that such an agency is denied the power to change its interpretation of the statute. *NLRB v. Seven-Up Co.*, 344 U.S. 344, 352 (1952). In *American Chicle Co. v. United States*, 316 U.S. 450, 455 (1942), the theory that legislative history and "a long indulged administrative construction" made it impossible for the agency to promulgate a regulation comporting with the plain meaning of the statute, was rejected by this Court, even though Congress had reenacted the statute during the interim. *Allstate Construction Co. v. Durkins*, 345 U.S. 13, 16 (1953). This Court had also held that the doctrine of equitable estoppel is not a bar to the correction by an agency of a mistake of law and that such a change could be applied retroactively. *Automobile Club v. C.I.R.*, 353 U.S. 180, 183-184 (1957).

The construction given to the statute by the court does not burden interstate commerce. Petitioner incorrectly stated on p. 11 of its brief that persons who purchase pipe within the State of Texas are not subjected to a sales or a use tax. There is *no exemption* from Sales or Use Tax for the sale of pipe for use within the State. All purchasers of pipe within the State for use in the State pay the State sales tax. Petitioner states no authority for its assertion. A tax on storage after an item has completed its interstate transportation does not violate the Commerce Clause. This Court has established the validity of a tax on storage within a state after the cessation of interstate transportation in *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). The Texas Court held that such a taxable storage had occurred within the State of Texas after the end of interstate transportation.

3. Petitioner did not adequately preserve its federal question to invoke the jurisdiction of this Court.

To raise a federal constitutional issue under 28 U.S.C. §1257, it must have been raised, preserved and passed upon in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1975). Petitioner pleaded the violation of due process and equal protection guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 3 and 19; Article VIII, Sections 1 and 2 of the Constitution of the State of Texas. Thereafter, Petitioner did not again refer to the Fourteenth Amendment in its Reply Brief to the Third Court of Civil Appeals, see pages 22-24, or its Reply Brief to the Supreme Court of Texas, see pages 12-15. In its Motion for Rehearing, it did not raise any constitutional questions, but requested review based on two points of error:

> I. This court erred in reversing the judgments of the courts below and rendering judgment for Petitioners because there was no basis in the record upon which this court could conclude that a "storage" of the pipe has occurred. Motion for Re-Hearing, p. 1.
>
> II. This court erred in construing Article 20.04(G)(3)(a) not to apply to Lone Star. Motion for Rehearing, p. 5.

Under the second point of error, the entire argument went to the construction placed on the word use. It is well settled that the federal question must be presented to the state courts in such a fashion as to preclude any question that reliance is placed on federal rights as distinguished from rights based on state law. *Gibbes v. Zimmerman*, 290 U.S. 326, 328 (1933). Here all

argument concerning due process and equal protection in the appellate courts of Texas was based on Article I of the Texas Constitution. In *Gibbes, supra*, this Court held that the fact that state and federal constitutions guaranteed the same rights was to no avail.

At no time did Petitioner raise before the Texas courts the possibility of burden on interstate commerce. In fact, in its Motion for Rehearing to the Supreme Court of Texas when discussing *Southern Pacific v. Gallagher, supra*, it states: "Lone Star has never claimed the protection of the federal constitution for its use of the pipe". At p. 9. It is conceded by Respondents that the Motions for Rehearing might have been the first time this issue should have been raised. *Herndon v. Georgia*, 295 U.S. 441 (1935). Failure to raise the issue at any point prevents review by this Court. *C.I.O. v. McAdory*, 325 U.S. 472 (1945).

CONCLUSION

The issues presented before this Court were not adequately preserved for review by this Court. The decision of the Texas Supreme Court is based on a purely state ground. Respondents respectfully request that this Application for Writ of Certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

MARTHA E. SMILEY
Assistant Attorney General
Chief, Taxation Division

MYRA A. MCDANIEL
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Counsel for Respondents

PROOF OF SERVICE

I hereby depose and say that I am a member of the Bar of the United States Supreme Court and this ____ day of October, 1978, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioner Lone Star Gas Company, by depositing the same in the United States Post Office addressed to the Honorable Michael L. Cook, one of its counsel of record, at his post office address, Post Office Box 1148, Austin, Texas 78767, with Certified, Return Receipt Requested, First Class postage prepaid.

MARTHA E. SMILEY
Assistant Attorney General

APPENDIX

Art. 20.04, Title 122A, Tax.-Gen., 20A V.T.C.S.

(G) Interstate Shipments.

(3) Special Use Tax Exemption. The use tax imposed herein shall not apply to:

(a) The use, in this State, of tangible personal property which is acquired outside this State and which is moved into this State for use as a licensed and certificated carrier of persons or property.

(b) The temporary storage in this State of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property which is used solely outside this State.

(c) The storage, use or consumption of tangible personal property which is acquired outside this State, the sale, lease or rental or the storage, use or consumption of which tangible personal property would be exempt from the limited sales or use tax were it purchased within this State.

(d) The storage and use, in this State, of tangible personal property acquired outside this State for use as a repair or replacement part for and actually affixed in this State to a self-propelled vehicle which is a licensed and certificated common carrier of persons or property.